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IN THE

Supreme Court of the United States

October Term, 1978

CHARLES BERG,

Petitioner,

vs.

JOAN ANDERSON GROWE, Secretary of State, State of Minnesota, et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

Charles Berg, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Minnesota Supreme Court entered on the above entitled case on January 13, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Minnesota is reported as:

Ulland, et al., Charles Berg, vs. Joan Anderson Growe, Secretary of State, State of Minnesota, —— Minn. ——, 262 N.W. 2d 412 (1978).

It is printed in Appendix A attached hereto. The opinion of the Supreme Court of the State of Minnesota was filed on January 13, 1978, sustaining a judgment of the District Court of the State of Minnesota.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on January 13, 1978. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether Minnesota Statutes §204.33, Subd. 2 and 4, which requires that the names of party-affiliated candidates be listed on general election ballots before the names of independent candidates, violates the First Amendment and the Equal Protection clause of the Fourteenth Amendment.

2. Whether the decision below should be summarily reversed, or vacated and remanded for reconsideration, in light of the intervening decision of this Court in *Illinois State Board of Elections v. Sangmeister*, No. 77-1100, 46 U.S.L.W. 3597 (U.S., March 27, 1978).

STATEMENT OF CASE

Mr. Charles Berg was a state senator in the Minnesota legislature. He intended to file an affidavit of candidacy in 1976 for re-election to the 1977 Minnesota legislature. He did not intend to be affiliated with any political party.

In late 1975, Berg and others commenced this action to challenge the then-existing statutorily-mandated practice of Minnesota under which candidates were listed on the ballot in the order their parties finished in the previous election with independent candidates following thereafter. See Minn. Stat., 1975 Supp. §203A.33, Subd. 4. Trial commenced on March 15, 1976. After the conclusion of testimony, but prior to the trial court's decision, the Minnesota legislature amended the statute to require the listing of partisan candidates in inverse proportion to the size of the previous party vote. L. 1976, c. 224, §3. Consequently, the claims of the other plaintiff-candidates, each of whom was affiliated with a political party, were dismissed, leaving Berg as the sole remaining plaintiff, challenging the continued placement of independent candidates at the end of the ballot.

The trial court rejected with opinion, see Appendix B, Berg's claim that the ballot placement provision violated the First Amendment and the Equal Protection clause of the Fourteenth Amendment, and the Minnesota Supreme Court affirmed on January 13, 1978.[1] That Court found that "positional bias", whereby the first-listed candidates on a ballot receive a substantial number of extra votes from voters who

[1] After the decision of the Trial Court and prior to the decision of the Minnesota Supreme Court, Berg lost his bid for re-election on November 2, 1976, to a candidate with the Democratic Farm Labor Party. The vote totals were: Roger Strand—14,872, Charles Berg—14,242.

are either uninformed or uninterested in the candidates and who habitually select the first-listed candidates, "does exist" in Minnesota. App. A-10; see also App. A-4. Nevertheless, the Court felt that the resulting discrimination did not violate the Fourteenth Amendment.

The Minnesota Supreme Court reasoned that it was limited to a choice of either the strict scrutiny test or the rational basis test. App. A-6. Then, although the court conceded that positional bias did in fact affect Minnesota elections, it declined to apply the heightened scrutiny this Court has required for electoral regulations having "a real and appreciable impact on the exercise of the franchise," *Bullock v. Carter*, 405 U.S. 134, 144 (1972). The Court held that the challenged statute was a simple electoral regulation relying on *Meyers v. Roberts*, —— Minn. ——, 246 N.W. 2d 186 (1976), app. dismissed 429 U.S. 1083 (1977), requiring only minimal scrutiny. The Court held that Minnesota's asserted interest in "assist[ing] partisan voters in locating their candidates on the ballot" sufficed to justify the challenged statute.

REASONS FOR GRANTING THE WRIT

This Court Should Resolve An Important Conflict Between The Decision Below And A Subsequent Decision Of This Court.

The decision of the Minnesota Supreme Court, upholding Minnesota's policy of placing independent candidates on the bottom positions on voting ballots in all general elections, is in direct conflict with this Court's recent summary dismissal of an appeal from a decision of the Court of Appeals for the Seventh Circuit striking down a nearly identical practice in Illinois. *Illinois State Board of Elections v. Sangmeister*, No. 77-1100, 46 U.S.L.W. 3597 (U.S., March 27, 1978), *aff'g mem. Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977).

In *Sangmeister*, the Seventh Circuit employed a two-part test to measure the constitutionality of ballot placement procedures. Finding that plaintiffs met the test, by proving first that top placement on the ballot was an advantage, and second that there was an intentional or purposeful discrimination by authorities in favoring one class over another, the court struck down the challenged practice. This Court's summary dismissal of the appeal was, of course, an adjudication on the merits. See, e.g. *Hicks v. Merando*, 422 U.S. 332 (1975); *Ohio ex rel. Eaton v. Price*, 360 U.S. 246 (1959).[2]

As the decision of the Minnesota Supreme Court makes clear, plaintiff here meets each part of the *Sangmeister* test. First, it is not disputed that top placement on the Minnesota ballot is an advantage. Second, statutorily mandated disad-

[2] Even before the summary dismissal of the appeal in *Sangmeister*, the principle that the First and Fourteenth Amendments do not permit the names of independent candidates to be relegated to the bottom of the ballot had been accepted by other courts as well. See, e..g., *Gould v. Grubb*, 14 Cal. 3d 661, 122 Cal. Rptr. 377, 536 P.2d 1337 (1975).

vantageous placement of independent candidates compelled by Minn. Stat. §203A.33, Subd. 2 and 4, is by definition "intentional or purposeful discrimination."

Nor can Minnesota's practice be justified by the state interest asserted, the need "to assist partisan voters in locating their candidates on the ballot," App. A-10. The Seventh Circuit dismissed a substantially identical interest, the "administrative need to avoid confusion and to have a consistent practice so that voters will know in advance where the parties will be on the ballot," with the observation that "it is difficult to understand how this practice satisfied those requirements any more efficiently than would a neutral system of ballot placement." The observation is applicable here as well. The interest asserted by the state could be as efficiently served by a neutral system of ballot placement that would not burden *all* independent candidates in *all* general elections. Partisan voters could as well locate their candidates if they were listed consistently last on the ballot, rather than first.

The conflict between the decision below and *Sangmeister* is important, and requires the exercise of the Court's discretionary jurisdiction. The Court has given careful attention to claims that independent candidates were being unfairly disadvantaged in the electoral process. See, e.g. *Storer v. Brown*, 415 U.S. 724 (1974); *Buckley v. Valeo*, 424 U.S. 1, (1976). Although the restriction on access to the electoral process here is less than total, the disadvantageous placement mandated by state law raises important questions concerning the extent to which state electoral regulations may freeze the *status quo*. As the Court said in *Williams v. Rhodes*, 393 U.S. 23, 32 (1968):

> "There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people

> vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.

Because this Court's decision in *Sangmeister* appears fully to control the resolution of this case, petitioner suggests that the Court should grant the petition for certiorari and summarily reverse. See, e.g. *Helvering v. Wiese*, 292 U.S. 614 (1934); *Mason v. City of Biloxi*, 385 U.S. 370 (1966). Even if *Sangmeister* could be distinguished on its facts, as resolving only the rights of parties other than the dominant party, and not the rights of independent candidates,[3] that would be a distinction without a difference. As the decisions of this Court make clear, independent candidates are entitled to the same fair treatment by state ballot regulations as minority party candidates. E.g., *Exon v. McCarthy*, No. 76-492, 429 U.S. 972 (1976); *McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (Powell, Circuit Justice); *Storer v. Brown*, 415 U.S. 724 (1974).

Alternatively, the petition should be granted, and the judgment below vacated and remanded for consideration by the Minnesota Supreme Court in light of this Court's subsequent decision in *Sangmeister*. See, e.g., *Torrance v. Callenius*, 369

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[3] The Seventh Circuit's guidelines for the district court remand provided:

> "The procedure adopted should take account of all political parties involved, major and/or minor. While we need not decide whether the district court's order to exclude minor parties from the rotation selection procedure was valid, we recognize that there may be serious questions about its constitutional propriety." 565 F.2d at 468.

That the case directly involved the rights of independent candidates as well is indicated by the court's reference to the complaint, which alleged that the defendant Board "has always placed the Republican Party candidates on the first line of the ballot, and the Democratic Party candidates *and the Independent candidates have always been placed in the second or lower lines of the ballot*. 565 F.2d at 462 (emphasis added).

U.S. 658 (1962); *Public Service Commission v. Federal Power Commission*, 361 U.S. 195 (1959). Because *Sangmeister* casts such serious doubt on the correctness of the judgment below, and because of the serious potential that unfair treatment of independent candidates has for jeopardizing "the potential fluidity of American political life," *Jenness v. Fortson*, 403 U.S. 431 (1971), it would be appropriate to permit the Minnesota courts, in the first instance, to require whether there are valid grounds for distinguishing *Sangmeister* from the instant case.

CONCLUSION

For the foregoing reasons the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 272
Ramsey County

Todd, J.
Took no part, Otis, J.
Endorsed
Filed January 13, 1978
John McCarthy, Clerk
Minnesota Supreme Court

JAMES E. ULLAND, et al,
Plaintiffs,
CHARLES BERG, Plaintiff, group IV,
Appellant,
vs.
JOAN ANDERSON GROWE, Secretary of State, State of Minnesota, et al,
Respondent.

SYLLABUS

1. Positional bias resulting from the placement of candidates' names on election ballots exists in varying degrees in Minnesota election contests. However, marginally unequal treatment which may result is not in and of itself a sufficient basis for declaring the statute governing the placement of candidates" names on election ballots unconstitutional.

2. The Minnesota statute regulating the placement of candidates' names on election ballots does not directly infringe the fundamental right to vote and will be tested by this court under the "rational basis" standard of review.

3. The method employed in Minn. St. 203A.33, subd. 2 and

4, for determining the order in which candidates' names will appear on partisan election ballots satisfies the requirements of the equal protection clause under the "rational basis" standard of review.

Affirmed.

Considered and decided by the court en banc.

OPINION

TODD, Justice.

Charles Berg and several other parties[1] brought this action against Joan Growe, Minnesota secretary of state, and others, challenging on equal protection grounds the constitutionality of the Minnesota statute which governs the placement of candidates' names on election ballots in Minnesota. Under the present statutory scheme, names of party-designated candidates must precede those of independent candidates on partisan election ballots. Berg, as an independent candidate, will never have his name appear first on a ballot. The trial court found the statute to be constitutional. We affirm.

The statute in question, presently codified as Minn. St. 203A.33, subd. 2 and 4, controls the order in which candidates' names appear on partisan election ballots.[2] The procedure of listing party-designated candidates before independent candidates is not a new one, having appeared in substantially similar form as early as 1901. See, R. L. 1905, §§ 173, 174. Nonpartisan election ballots, however, are governed by the provi-

[1] Originally, several Republican candidates were also named as plaintiffs in this action. The Independent-Republican Party of Minnesota later intervened as a plaintiff pursuant to Rule 24.02, Rules of Civil Procedure. During the pendency of the litigation, a statutory amendment was passed which obviated their constitutional claims. Consequently, these plaintiffs were dismissed from the action, leaving Berg as the sole plaintiff.

[2] The term "partisan election" as used in this litigation denotes an election in which the party affiliation of each candidate is designated on the ballot.

sions of Minn. St. 203A.35, which requires that candidates' names be "rotated."[3] This section has an equally long history. See, L. 1915, c. 165, § 2. Prior to 1973, legislative elections in Minnesota were nonpartisan. However, the 1973 legislature changed the law to require that its members be chosen in partisan elections. L. 1973, c. 3. The 1974 election for members of the Minnesota House of Representatives was conducted pursuant to the provisions of Minn. St. 1974, § 203.33, subd. 2 and 3. This statute provided in part:

> "Subd. 2. At the general election, and *in the case of partisan offices only*, the names of candidates nominated by petition shall follow those of candidates nominated at primaries in the order in which the petitions are filed.
>
> "Subd. 3. At the general election, and *in the case of partisan offices only*, the first name printed for each office, or group of names if more than one is to be voted for, for the same office, shall be that of the candidate of the political party which at the last preceding general election polled the *largest* number of votes, the same to be determined by the average vote cast for that party's candidates for partisan offices except representatives in congress. In like manner the second and succeeding lines shall be filled with the names of the candidates of the other political parties receiving the next highest number of votes respectively. * * *" (Italics supplied.)

In 1975, this section was repealed and reenacted in identical language and renumbered as Minn. St. 1975 Supp. § 203A.-33, subd. 2 and 4. The following year, members of both the

[3] Ballot "rotation" is a means for eliminating whatever element of "positional bias" may exist in an election by utilizing several different forms of the same ballot, each of which lists the candidates in a different order. See, Minn. St. 203A.23, subd. 5.

House and Senate were up for reelection. Berg was an independent candidate for reelection as state senator in the 1976 election and was defeated.

This litigation was commenced in the fall of 1975. The theory of the action as it concerned Berg was that the treatment afforded independent candidates by Minn. St. 1975 Supp. § 203A.33, subd. 2 and 4, denied them equal protection of the laws under the Fourteenth Amendment. Specifically, it was alleged that § 203A.33, subd. 2, would invariably operate to place the name of a party-designated candidate in the first position on the ballot. A "distinct advantage," it was alleged, exists in favor of the candidate whose name appears in the top ballot position.[4] The primary purpose of the action was to compel an allocation among all candidates of the presumed benefit conferred by being listed first on the ballot. Plaintiffs in the action no doubt contemplated court-ordered ballot rotation as a means for the accomplishment of this goal.

At the conclusion of testimony, but prior to the trial court's decision, the Minnesota Legislature amended Minn. St. 1975 Supp. § 203A.33, subd. 4, by substituting the word "smallest" for the word "largest." L. 1976, c. 224, § 3. The effect was to place the names of candidates of the political party which had polled the smallest number of votes at the preceding general election in the first position on partisan ballots. In like manner, the second and succeeding positions are filled with names of candidates of other political parties receiving succeedingly higher numbers of votes respectively. As a result, the Independent-Republican Party and its candidates dismissed their claims.

[4] The constitutional claim of the original Independent-Republican Party plaintiffs was made on the theory that Minn. St. 1975 Supp. § 203A.33, subd. 4, would systematically grant the first position on the ballot to the Democratic-Farmer-Labor candidate in every partisan election.

Berg's constitutional claim was unaffected, however. The provision which dealt with independent candidates, § 203A.33, subd. 2, was not amended; and Berg continued to face the prospect of never having his name appear in the first position on a partisan ballot.

1. Berg's case at trial and argument before this court rested on the factual assumption that the candidate occupying the first position on the ballot will receive a substantial number of "extra" votes from voters who are either uninformed or uninterested in the candidates and habitually select the first name on the ballot. This phenomenon is referred to as "positional bias." The gravamen of Berg's equal protection claim is that by permanently denying him the first position on the ballot, § 203A.33, subd. 2 and 4, mandate an unequal division of the positional bias spoils.

Evidence was received by the trial court from several experts concerning the factors affecting the role of positional bias in an election. As is to be expected with an issue of this nature, the expert testimony was somewhat imprecise and inconclusive.[5] The parties' experts were, however, in agreement on several points which we believe important:

(1) Positional bias exists in most elections, but with a variable impact.

(2) Candidates' party affiliation is the single most important factor influencing a voter.

(3) Because of the importance of party affiliation, the

[5] We note, however, that several of the authorities rather heavily relied upon by Berg at trial seem particularly ill-suited to an examination of the effect of § 203A.33. The Note, 45 So. Cal. L. Rev. 365, is concerned largely with *nonpartisan* elections. The same can be said of the study by Harry M. Bain and Donald S. Hecock, Ballot Position and Voter's Choice (Wayne State University Press, 1957). Also, the presence of possible social-cultural variables renders at least suspect any inferences drawn from an English study referred to by one of Berg's expert witnesses.

effect of positional bias is considerably more pronounced in nonpartisan elections.

(4) The magnitude of positional bias tends to vary in inverse proportion to the visibility of a particular election. The less important (for whatever reason) the election, the greater the effect of positional bias.

(5) Numerous factors other than ballot position, including sex, ethnic background, and age, can influence an uninformed voter.

In sum, the expert testimony does indicate that an element of positional bias may be operating in some Minnesota elections.[6] Moreover, it is beyond dispute that § 203A.33, subd. 2 and 4, divides political candidates into two groups—party affiliated and independent—and treats those groups unequally with respect to whatever benefit positional bias may confer. But many statutes classify persons and provide for unequal treatment as between the classifications. Standing alone, such differential treatment has never been a sufficient basis for voiding a statute under the equal protection clause. Minneapolis Federation of Teachers v. Obermeyer, 275 Minn. 347, 354, 147 N. W. 2d 358, 363 (1966). Rather, it is the function of this court to examine, under the appropriate test, the state interests which the legislature sought to advance by enacting § 203A.33, subd. 2 and 4, and the relationship between those interests and the means employed to further them.

2. The critical threshold inquiry in Berg's equal protection challenge concerns the level of scrutiny to which § 203A.33, subd. 2 and 4, must be subjected by this court. The basic prin-

[6] We note with interest that whatever may be the effect of positional bias in Minnesota elections, it was of no moment to the DFL majority in the legislature which amended Minn. St. 1975 Supp. §203A.-33, subd. 4, thereby effectively ceding to other political parties the first positions on the ballot.

ciples in this area are familiar. It is well established that the exercise of the political franchise is a "fundamental right."[7] Legislative enactments which directly infringe such rights are subject to "strict scrutiny" review.[8] Thus, although the United States Supreme Court has frequently acknowledged the breadth of the states' powers over the mechanics of the electoral process,[9] regulations which have the effect of infringing the right to vote will be strictly scrutinized.[10] We must therefore select between two alternative characterizations of § 203A.33, subd. 2 and 4. Should we decide that the statute constitutes a sufficiently direct infringement on fundamental franchise rights, the "strict scrutiny" test must be employed. If, on the other hand, § 203A.33, subd. 2 and 4, are more in the nature of a simple electoral regulation, "rational basis" scrutiny is appropriate. Meyers v. Roberts, —— Minn. ——, 246 N. W. 2d 186 (1976), appeal dismissed, 429 U. S. 1083, 97 S. Ct. 1089, 51 L. ed. 2d 529 (1977).

Although a number of cases contain dicta concerning the implications of positional bias,[11] only two decisions address

[7] The United States Supreme Court has stated that although the right to run for elected office is not a "fundamental right," it is often so closely related to voting rights that a candidate adversely affected by an unconstitutional election law may in effect assert the franchise rights of his supporters. See, Bullock v. Carter, 405 U. S. 134, 142, 92 S. Ct. 849, 855, 31 L. ed. 2d 92, 99 (1972).

[8] Harper v. Virginia State Bd. of Elections, 383 U. S. 663, 86 S. Ct. 1079, 16 L. ed. 2d 169 (1966).

[9] See, e. g., Lubin v. Panish, 415 U. S. 709, 94 S. Ct. 1315, 39 L. ed. 2d 702 (1974); Storer v. Brown, 415 U. S. 724, 94 S. Ct. 1274, 39 L. ed. 2d 714 (1974); Bullock v. Carter, 405 U. S. 134, 92 S. Ct. 849, 31 L. ed. 2d 92 (1972); Williams v. Rhodes, 393 U. S. 23, 89 S. Ct. 5, 21 L. ed. 2d 24 (1968).

[10] Williams v. Rhodes, *supra*.

[11] See, Elliot v. Secretary of State, 295 Mich. 245, 294 N. W. 171 (1940); Gilhool v. Chairman & Commrs. Philadelphia County Bd. of Elections, 306 F. Supp. 1202 (E. D. Pa. 1969), affirmed, 397 U. S. 147, 90 S. Ct. 996, 25 L. ed. 2d 182 (1970); Holtzman v. Power, 62 Misc. 2d 1020, 313 N. Y. S. 2d 904 (1970); Kautenburger v. Jackson, 85 Ariz. 128, 333 P. 2d 293 (1958); Weisberg v. Powell, 417 F. 2d 388 (7 Cir. 1969).

the issue squarely and provide any guidance for our inquiry. In support of Berg's position, we are referred to the California case of Gould v. Grubb, 14 Cal. 3d 661, 122 Cal. Rptr. 377, 536 P. 2d 1337 (1975). In that case, a candidate for the *nonpartisan* office of city council member in Santa Monica challenged the constitutionality of a city charter provision which adopted the state election procedure of placing incumbents' names in the first position on the ballot, followed by the names of other candidates in alphabetical order. The California Supreme Court accepted the trial court's determination that candidates in the first position on the ballot receive a significant number of "extra" votes. From this factual premise, the court reasoned that the votes of those persons who favored nonincumbent candidates were in effect "diluted" by the extra votes afforded the incumbent candidate as a result of his position on the ballot. Such dilution, it was held, is of the same character as that which the United States Supreme Court struck down in Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L. ed. 2d 506 (1964), and other legislative reapportionment cases. As a consequence, the California court invoked the strict scrutiny test and held the offending Santa Monica charter provision unconstitutional.

We decline to adopt the analysis of the Gould case on two grounds. First, the evidence in the instant case would not sustain the premise upon which the California decision was based. Unlike the findings in Gould, the testimony below, while permitting a finding that positional bias does exist, furnishes no adequate means for measuring its extent. Also, the election in Gould was nonpartisan. The Minnesota statute at issue here applies only to *partisan* elections. The experts at trial agreed that the effect of positional bias is much less pronounced in partisan elections. Most significantly, the evidence clearly

establishes that party designation is of far greater importance than ballot position. Taken together, these observations depict a factual setting meaningfully distinguishable from that which the California court considered.

Second, even if our facts were closer to the Gould case, we cannot agree that Reynolds v. Sims, *supra*, and the reapportionment cases provide the proper analytical framework for dealing with the positional bias phenomenon. The reapportionment cases are concerned with genuine arithmetical dilution, i. e., where two legislative districts of substantially unequal population size elect the same number of legislative representatives. In a very real sense, persons in the larger of two such districts get less representation per vote than persons in the smaller district. Alternatively stated, residents of the smaller district in effect cast a number of "phantom" votes. Population growth thus dilutes the "value" of the individual votes cast in the larger district, constituting a direct infringement on the right to vote.

Positional bias is not of the same nature. It does not create any "phantom" votes or reduce the value of any individual vote, because the "biased" votes themselves are cast by fully qualified voters. We know of no authority which would allow us to treat the votes of any voters, however ill-informed, as if they were somehow inferior, thereby "diluting" the effect of the more thoughtfully cast ballots. In short, the fact that some citizens may choose to vote irrationally, as is their right, does not mean that the votes of better-informed voters are arithmetically "diluted" within the language of the reapportionment decisions.[12] Thus, even if we agreed that positional

[12] Arithmetical dilution differs from positional bias in another practical sense. As the court stated in Clough v. Guzzi, 416 F. Supp. 1057, 1067 (D. Mass. 1976): "The state practice here differs significantly from those in the apportionment and other voting cases where the

bias played a significant role in Minnesota elections, we could not concur in the California court's reliance on the reapportionment cases for a method of conceptualizing the problem. Accordingly, we do not view Gould v. Grubb, *supra*, as a persuasive authority for invoking the strict scrutiny standard of review in this appeal.

Instead, we are favorably impressed with the approach taken by a Masschusetts Federal district court in the recent case of Clough v. Guzzi, 416 F. Supp. 1057 (D. Mass. 1976). The election statute challenged in Clough provided not only that the incumbents' names appear first on all ballots, but also required that the names be followed by the designation "incumbent." Thereafter, the other candidates for the office were to appear in alphabetical order. To resolve the equal protection issue, the court analyzed those decisions of the United States Supreme Court which had held unconstitutional, on Fourteenth Amendment grounds, a variety of state election statutes. We are in agreement with the court's analysis as follows (416 F. Supp. 1066):

> "* * * The right to run for public office, and with it the status of candidacy, is not itself viewed as a fundamental right which in and of itself warrants strict scrutiny. * * * But a practice which, by impinging upon the status of candidacy also has the effect of placing a limitation or incidental burden on the exercise of voting rights, may be subject to rigorous judicial review. * * * Whether it is subject to such rigorous review requires an examination 'in a realistic light' of the extent and nature of the impact of the questioned practice on the right to vote. * * *
>
> "In the instant case, we are not persuaded that the alleged burden on candidacy has a sufficient impact on the right of Massachusetts voters to choose a representative government as to warrant strict judicial scrutiny. * * * We first note what the challenged statutes do not do; they do not impose direct restrictions on the exercise of the right to vote, e. g., Harper v. Virginia Board of Elections, 383 U. S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966) (poll tax); they do not effectively bar candidates from an election by imposing prohibitively burdensome candidacy filing fees * * * and they do not restrict the ballot to candidates of only certain political parties. * * * Powerful restrictions of this sort have been held to have such a severe impact on the right to vote as to warrant greater judicial concern, and accordingly stricter scrutiny, lest a fundamental right be infringed."

If the Massachusetts statute under consideration in Clough v. Guzzi, *supra*, was not a sufficiently "powerful restriction" to warrant strict scrutiny on review, then Minn. St. 203A.33, subd. 2 and 4, which are less burdensome, are likewise not subject to strict scrutiny. The statute challenged in Clough applied to all primary and general elections, while its Minnesota counterpart applies only to partisan elections. In addition, un-

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courts have exercised strict scrutiny, in that it does not create the same kind of immutable or absolute advantage or preclusion. In the apportionment cases, the district lines and populations were fixed and the effects of malapportionment unavoidable for voters within the disadvantaged districts. In contrast, the dilution effect herein depends upon the existence of a pool of presumably uninformed voters. Yet non-incumbents and their supporters have access to those voters and may, in theory and possibly in practice, so educate them as to eliminate the donkey vote and thus eliminate the statistical position bias. Furthermore, the impact of the Massachusetts statutes on the total vote is not so clear that we can really define with anything approaching certainty, as would be possible in the apportionment cases, how significantly the state is directly affecting the weight of anyone's vote. The principle of dilution as affecting the fundamental right to vote would seem better reserved for the more clear-cut and certain cases of inequality."

like the Massachusetts statute, § 203A.33, subd. 2 and 4 do not specially designate incumbent candidates. We therefore adopt the analysis of the Clough decision and apply the rational basis test in our evaluation of § 203A.33, subd. 2 and 4.

3. In Schwartz v. Talmo, 295 Minn. 356, 362, 205 N. W. 2d 318, 322 (1973), we stated the principles to be applied in evaluating the interests of the state in support of a legislative classification:

> "* * * The rule is that legislative classification will be held to be constitutionally valid if—
>
> "(1) the classification uniformly, without discrimination, applies to and embraces all who are similarly situated with respect to conditions or wants justifying appropriate legislation;
>
> "(2) the distinctions which separate those who are included within the classification from those who are excluded are not manifestly arbitrary or fanciful, but are genuine and substantial so as to provide a natural and reasonable basis in the necessity or circumstances of the members of the classification to justify different legislation adapted to their peculiar conditions and needs; and
>
> "(3) the classification is germane or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the remedy or regulations therefor which the law purports to provide."

Berg argues that the evidence in this case is not sufficient to establish a rational basis for the classification in § 203A.33, subd. 2 and 4. We disagree. A review of the record discloses evidence sufficient to meet the criteria of Schwartz, although it must be observed that more detailed information could have been produced from the evidence available. The fact that party

designation, not ballot position, is the most substantial influencing factor supports the legislative determination expressed by § 203A.33, subd. 2 and 4. The expert testimony at trial reveals that over 2/3 of the voters in Minnesota identify with a major political party. The method selected by the legislature to assist partisan voters in locating their candidates on the ballot cannot be overturned by this court merely because we think a rotation system would be marginally more fair. We are mindful of the proper role of an appellate court conducting a "rational basis" review of a legislative enactment. It is the function of the legislature to make classifications; and our past decisions make it clear that the legislature is not required to adopt the means which this court thinks best for furthering the state's interests. As we said in Minneapolis Federation of Teachers v. Obermeyer, 275 Minn. 347, 354, 147 N. W. 2d 358, 363:

> "* * * Courts are not to weigh the merits of a classification in the judicial balance and to reject it merely because they might favor a different standard."

Further, we agree with the court in Clough v. Guzzi, 416 F. Supp. 1057, 1068, when it said:

> "* * * The fact that some statistical advantage may at the same time accrue to one of the candidates by virtue of his or her incumbency does not for constitutional purposes invalidate that otherwise legitimate purpose, especially where that advantage remains problematic and variable from election to election. And whether for purposes of a more absolute fairness that advantage warrants a different statutory scheme is properly a legislative consideration."

We therefore hold that Minn. St. 203A.33, subd. 2 and 4, satisfy the constitutional standards we have prescribed and

conclude that any deviation from the present method of assigning ballot position is properly a matter for legislative determination.

The decision of the trial court is affirmed.

MR. JUSTICE OTIS took no part in the consideration or decision of this case.

STATE OF MINNESOTA — DISTRICT COURT
County of Ramsey — Second Judicial District

No. 406759

JAMES E. ULLAND, et al., and
CHARLES BERG,

Plaintiffs,

vs.

JOAN ANDERSON GROWE, Secretary of State, State of Minnesota; LOU McKENNA, Director of the Department of Property Taxation, County of Ramsey; VERNON T. HOPPE, Finance Director of the County of Hennepin; THOMAS R. GREEDER, Washington County Auditor; CARL D. ONISCHUK, Dakota County Auditor; MILTON N. OWENS, Blue Earth County Auditor; ANDREW KORDA, St. Louis County Auditor; WESTON HENDRICKSON, Lyon County Auditor; and KENNETH ROBERTS, Nobles County Auditor,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

The above-entitled matter came on for hearing before the

undersigned Judge of District Court, without a jury, on March 15, 1976. Plaintiffs Independent-Republicans of Minnesota were represented by their attorneys, Bruce D. Willis, of the firm of Popham, Haik, Schnobrich, Kaufman & Doty, 4344 IDS Center, Minneapolis, Minnesota, and by Eldon Spencer, 1200 National City Bank Building, 510 Marquette Avenue, Minneapolis, Minnesota. All other plaintiffs were represented by their attorney, Robert C. Bell, of the firm of Peterson, Bell and Converse, 1800 American National Bank Building, St. Paul, Minnesota. Defendants Growe and Spannaus were represented by their attorneys, Richard B. Allyn, Solicitor General, and Thomas H. Jensen, Special Assistant Attorney General, 160 State Office Building, St. Paul, Minnesota.

The matter was further heard on various motions submitted to the Court on April 29, 1976, wherein all parties were again represented by counsel. Pursuant to motions heard on that date, this Court has entered its Order dated April 30, 1976, dismissing all plaintiffs herein, with the exception of Charles Berg, and also dismissing Defendant Spannaus as a party to the action.

The Court having heard all of the evidence, and upon the briefs, files and records herein, makes the following:

FINDINGS OF FACT

I

Plaintiff Charles Berg is a duly elected Minnesota State Senator in the Legislature from District 15, serving a term to which he was elected in 1972. Said plaintiff intends to and will seek reelection from that district as a State Senator, and meets all legal qualifications to seek reelection.

II

As an independent, Plaintiff Berg intends to and will seek reelection by being nominated by petition pursuant to M.S.A.

202A.28. Pursuant to said petition Plaintiff Berg's name would appear on the ballot in the general election to be held on November 2, 1976, along with any other candidates who will have been nominated by the same office by the DFL party and the Independent-Republican party of Minnesota.

III

There are approximately 20,000 persons residing in Senate District 15 who normally vote in the general elections of this state and who would be expected to vote on November 2, 1976. On that date the voters will have an opportunity to vote for candidates for president of the United States, United States senator, U.S. representative in Congress, as well as candidates for other offices.

IV

Pursuant to Minnesota statutes 203A.33 Subdivision 4, as amended by 1976 Laws Chapter 224, at the general election the first name printed for the partisan office of State Senator will be that person nominated by the Independent-Republican party, it having polled the smallest number of votes at the 1972 general election. In like manner the second name printed on the second line would be the name of the candidate nominated by the DFL party.

V

Pursuant to M.S.A. 203A.33 Subdivision 2, the name of Plaintiff Berg as a candidate nominated by petition would follow those candidates nominated at primaries by the respective political parties, and his name, along with names of any other candidates nominated by petition, would follow on the ballot in the order in which the petitions were filed.

CONCLUSIONS OF LAW

I

Chapter 203A. of the Minnesota statutes, as amended by Laws 1976 Chapter 224, is constitutional and is not in violation of the Fourteenth Amendment of the United States Constitution nor of the Constitution of the State of Minnesota.

II

Defendant Growe is entitled to judgment against Plaintiff Berg, together with her costs and disbursements herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

The following memorandum is made a part of this Order.

OTIS H. GODFREY, JR.
Judge of District Court

Dated: July 1, 1976.

MEMORANDUM

The matter herein has been the subject of considerable debate among political scientists, and has been before both state and federal courts across the country. The experts who testified before this Court are in general agreement with each other, as well as the leading authorities who have written on ballot position and voter choice. The evidence is strong that being first on the ballot in a non-partisan race does create a significant advantage for that particular candidate. There is a positional bias in all elections, but it is greater in non-partisan or primary contests, particularly for races for less visible offices.

It would further appear, however, that positional bias is sharply reduced, although not eliminated, when a party label is added, since the party of a candidate is perhaps the single most important factor for most voters. In any event, ballot position could affect the outcome in a close election.

Since the present law provides that any positional advantage is to be given to that party which had fewer votes in the last general statewide election, the only issue remaining for consideration by the Court concerns Plaintiff Charles Berg, who plans to run for the State Senate as an independent, nominated by petition, without a primary contest. From all of the evidence presented on that factual question, the Court is not persuaded that the present statute is constitutionally impermissible.

Our Courts have uniformly held that all statutes benefit from a presumption of validity, and it is incumbent upon the plaintiff to show that the law can have no rational relationship to the achievement of any conceivable state interest. A law is not to be declared unconstitutional merely because the Court deems it bad policy. See *Wade vs. Waller*, 402 F. Supp. 922 (1975). *Schwartz vs. Talmo*, 295 Minn. 356, 205 NW2d 318.

The statute in question is designed to enable voters to find the candidates for office who have been endorsed by a political party. It can be assumed that Plaintiff Berg has been elected in the past without any such endorsement from a political party in his district. He has furthermore failed to demonstrate a sufficient magnitude of positional bias against an independent candidate to justify overturning the pertinent statutes on constitutional grounds.

O.H.G.

Supreme Court, U. S.
FILED
MAY 5 1978
MICHAEL RODAK, JR., CLE

77-1461

IN THE

Supreme Court of the United States

October Term, 1978

CHARLES BERG,

Petitioner,

vs.

JOAN ANDERSON GROWE, Secretary of State, State of Minnesota, et al.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION

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TO THE SUPREME COURT OF MINNESOTA

BRIEF IN OPPOSITION

QUESTION PRESENTED

Under the challenged Minnesota statute which determines the order in which a candidate's name appears on the ballot, the names of candidates nominated by petition follow the names of candidates nominated at primaries. Where the Minnesota Supreme Court has determined that the trial record affords no adequate means for measuring the extent of any positional bias, does the statute deny equal protection of the laws to a candidate for the Minnesota Senate nominated by petition?

STATUTE INVOLVED

Minn. Stat. § 203A.33, subd. 2 (1976):

> *Ballots, candidates nominated by petition.* At the general election, and in the case of partisan offices only, the names of candidates nominated by petition shall follow those of candidates nominated at primaries in the order in which the petitions are filed.

STATEMENT OF THE CASE

Charles Berg was a 1976 candidate for the Minnesota Senate nominated by petition.[1] In 1975, he commenced this challenge

[1] Berg was not affiliated with a political party. "Political parties" in Minnesota are defined by statute. To meet that definition, a party must maintain an organization whose members number at least five percent of the total number of votes cast in the last general election in the county where application is made or have had a candidate in the last general election who received at least five percent of the vote. Minn. Stat. § 200.02, subd. 7 (1976). Presently, the Democratic-Farmer-Labor Party, the Independent-Republican Party, and the American Party are the only political parties in Minnesota.

to the constitutionality of Minn. Stat. § 203A.33, subd. 2 (1976) in Ramsey County District Court.

Berg contended at trial that a candidate whose name appears first on a ballot has an advantage over those candidates whose names follow. Under the challenged statute, Berg's name[2] would follow[3] the names of the candidates nominated at party primaries.[4] He claimed that this statutory ballot ordering denied him equal protection of the laws under the Fourteenth Amendment of the United States Constitution.[5]

The district court upheld the constitutionality of the statute and the Minnesota Supreme Court, sitting *en banc*, unanimously affirmed. Characterizing the expert testimony offered at trial as ". . . somewhat imprecise and inconclusive,"[6] the Court nevertheless found a consensus on five points:

> (1) Positional bias exists in most elections, but with a variable impact.
>
> (2) Candidates' party affiliation is the single most important factor influencing a voter.

[2] Candidates nominated by petition are so designated on the ballot as is the political principle which each candidate represents. Minn. Stat. §§ 202A.29, subd. 1 and 203A.34 (1976). Candidates affiliated with a political party are designated by the party label.

[3] On voting machines, "follow" may mean vertically underneath the top name or horizontally to the right of the first name, whichever applies. *See* Minn. Stat. § 203A.33, subd. 4 (1976).

[4] In the original action in the trial court, plaintiffs other than Berg challenged Minn. Stat. § 203A.33, subd. 4 (Supp. 1975). That statute placed the names of the candidates of the political party that had received the largest number of votes in the last preceding general election in the first ballot position. At the conclusion of testimony, but prior to the District Court's decision, the Minnesota legislature amended the challenged provision by substituting the word "smallest" for the word "largest." Minn. Stat. § 203A.33, subd. 4 (1976). Consequently, those plaintiffs dismissed their challenge.

[5] No First Amendment claim was addressed by the trial court nor raised, briefed, or decided on appeal to the Minnesota Supreme Court.

[6] Petition for Writ of Certiorari to the Supreme Court of the State of Minnesota, Appendix A, at A-5 (hereinafter "Appendix").

(3) Because of the importance of party affiliation, the effect of positional bias is considerably more pronounced in nonpartisan elections.

(4) The magnitude of positional bias tends to vary in inverse proportion to the visibility of a particular election. The less important (for whatever reason) the election, the greater the effect of positional bias.

(5) Numerous factors other than ballot position, including sex, ethnic background, and age, can influence an uninformed voter.[7]

The Court then analyzed the interplay of those points, further distilling them into the threefold conclusion that ". . . party designation is of far greater importance than ballot position"; that the effect of positional bias is ". . . much less pronounced in partisan elections"; and that, although positional bias may exist, the trial record offered ". . . no adequate means for measuring its extent."[8]

Based upon its findings as to the nature of positional bias, the Minnesota Supreme Court determined that the challenged statute did not constitute a sufficiently direct infringement on fundamental franchise rights to require the application of the strict scrutiny standard under the equal protection clause. In doing so, it adopted the reasoning in *Clough v. Guzzi*, 416 F. Supp. 1057 (D. Mass. 1976) (three-judge court).[9] The federal court there observed that ballot ordering statutes

> ". . . do not impose direct restrictions on the right to vote, *e.g., Harper v. Virginia Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed.2d 169 (1966) (poll tax); they do not effectively bar candidates from an election by imposing prohibitively burdensome candidacy filing fees . . . and they do not restrict the ballot to candidates of only certain political parties . . . ."[10]

[7] *Id.*, at A-5, 6.
[8] *Id.*, at A-8, 9.
[9] *Id.*, at A-10, 12.

Applying the rational basis standard, the Minnesota Supreme Court held the statute constitutional:

> The fact that party designation, not ballot position, is the most substantial influencing factor supports the legislative determination expressed by § 203A.33, subd. 2 and 4. The expert testimony at trial reveals that over 2/3 of the voters in Minnesota identify with a major political party. The method selected by the legislature to assist partisan voters in locating their candidates on the ballot cannot be overturned by this court merely because we think a rotation system would be marginally more fair.[11]

REASONS FOR DENYING THE WRIT

The Ruling of the Court Below is Not in Conflict With the Decisions of This Court or Other Courts.

Petitioner contends that there is a direct conflict between the decision of the Minnesota Supreme Court in the instant case and the decision of *Sangmeister v. Woodward*, 565 F.2d 460 (7th Cir. 1977) *appeal dismissed sub nom, Illinois State Board of Elections v. Sangmeister*, No. 77-1100, 46 U.S.L.W. 3597 (U.S., March 27, 1978). This contention is erroneous because the issues and the sufficiency of the evidence in each case were significantly different.

[10] *Id.*, at A-11.
[11] *Id.*, at A-13.

Sangmeister was a consolidated appeal from two district court decisions. In each of the district court actions, the plaintiffs had challenged the practice by election officials of placing the name of the candidate of their own respective political parties in the first ballot position. Both district courts found the challenged practice unconstitutional and ordered remedial action. The remedy directed by one district court, *Culliton v. DuPage County Board of Election Commissioners*, 419 F. Supp. 126 (N.D. Ill. 1976), required that the ballot order for each of the candidates and for each of the competing parties seeking straight ticket votes be determined by a drawing in the impending election and rotated in subsequent elections. 419 F. Supp. at 129. The remedy in the other action was expressly limited to rotation of major parties. The minor party represented at the trial did not appeal that limitation. *Sangmeister v. Woodward, supra* at 464 & n. 5.

Although the district court in *Culliton* included all candidates in its order, the propriety of that inclusion was not addressed by the Court of Appeals because the appellate court chose, because of procedural questions, to remand the action for further proceedings on the merits. Therefore, the only issue before the Court of Appeals was the issue raised by the second consolidated action which expressly excluded minor parties and independent candidates from its remedy.[12]

Unlike *Sangmeister*, the instant decision of the Minnesota Supreme Court addressed ballot rotation only as it involved

[12] Although the Court of Appeals ordered that its remedial rotational selection procedure ". . . should take account of all political parties involved, major and/or minor" its order in that respect was dictum. Sangmeister v. Woodward, 565 F.2d 460, 468 (7th Cir. 1977) *appeal dismissed sub nom*, Illinois State Board of Elections v. Sangmeister, No. 77-1100, 46 U.S.L.W. 3597 (U.S., March 27, 1978).

a candidate unaffiliated with a political party. In addition, the effect of ballot placement on voting is a question of fact. *Sangmeister v. Woodward, supra* at 465. Although the Court of Appeals found that the plaintiffs in each of the district court actions under review had met their burden of demonstrating that first position on the ballot confers an advantage to a candidate, the Minnesota Supreme Court found that ". . . the testimony below, while permitting a finding that positional bias does exist, furnishes no adequate means for measuring its extent."[13] Therefore, not only did *Sangmeister* not decide the issue presented to the Minnesota Supreme Court, but the sufficiency of the evidence in each case was at variance as well. Thus, the two decisions are not conflicting.

Finally, the Minnesota Supreme Court's decision is consistent with the decisions of this Court and other courts. Contrary to petitioner's suggestion, positional bias does not confer a permanent monopoly on the two major political parties because it is not immutable. Its effect ". . . depends upon the existence of a pool of presumably uninformed voters." *Clough v. Guzzi*, 416 F. Supp. 1057, 1067 (D. Mass. 1976). Consequently, anyone having

> . . . access to those voters . . . may, in theory and possibly in practice, so educate them as to eliminate the donkey vote and thus eliminate the statistical position bias.

Id.

[13] Appendix, at A-8.